Mukthar Ahmed (Migration) [2023] AATA 3054 (22 August 2023)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Mohammad Mukthar Ahmed
REPRESENTATIVE:	Mr Ravinder Singh (MARN: 1678111)
CASE NUMBER:	2211532
HOME AFFAIRS REFERENCE(S):	BCC2020/2431672
MEMBER:	Peter Booth
DATE:	22 August 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 22 August 2023 at 8:54am

CATCHWORDS
MIGRATION –Student (Temporary) (Class TU) visa – subclass 500 (Student) visa – false or misleading information– bank deposit certificate was a bogus document – applicant has provided no material or submissions to the effect that there are relevant compelling or compassionate circumstances – at the time of assessment of the student visa application that the documents need to be genuine – failed to meet the criteria in PIC 4020(1) – requirements of PIC 4020 can not be waived – decision under review affirmed

LEGISLATION
Migration Act 1958, ss 65, 499
Migration Regulations 1994, r 1.03, Schedule 2, cl 500.217

CASES
Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 29 July 2022 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).

5. The applicant applied for the visa on 7 October 2020. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).

6. The applicant appeared before the Tribunal on 4 August 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi and English languages.

7. The applicant was represented in relation to the review.

8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217 for the grant of the visa. Broadly speaking, this requires that:

    - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

    - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

    - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

    - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given, a bogus document or information that is false or misleading in a material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

14. On 7 October 2020, the applicant lodged an application for a Student (TU-500) visa. In support of the application he provided a bank statement and a term deposit receipt from Syndicate Bank dated 12 September 2020. The bank statement shows the applicant's mother, Ms Fatima Begum, is the account holder. The bank deposit certificate showed the account (number 30864010101354/1) held a balance of 250,000 INR (25 lakhs). The Department conducted checks to confirm the veracity of the bank deposit certificate and received information that confirmed the bank account with Syndicate Bank did not exist. Therefore, the bank deposit certificate was considered to be bogus.

15. On 7 March 2022, the Department requested that the applicant provide comment on the finding that the bank deposit certificate was suspected to be a bogus document. The applicant was also asked to specify if he believed there were any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiver of any or all PIC 4020(1) to justify the grant of the visa. The applicant was provided 28 days to response to the request. He did not respond.

16. On 29 July 2022 the delegate refused the application for a student visa on the basis that the bank deposit certificate was a bogus document.

17. On 9 August 2022 the applicant applied to the Tribunal for a review of that decision.

18. By letter dated 17 July 2023 the applicant was invited to comment on the delegate's decision dated 29 July 2022 and otherwise to provide any material in support of his application for review. He was invited to provide any response on or before 31 July 2023.

19. On 31 July 2023 the applicant provided a variety of documents including an undated and unsigned letter addressed to the Tribunal. The relevant parts of the letter are as follows:

> First, I would like to start with the allegation of bogus document which is a bank statement showing my mother's name Fatma Begum contains balance of INR 25,00,000 (Rupees Twenty-Five Lakhs Only). I have provided this document as true and correct information on the day of visa application which is 07/10/2020. According to my family in India, my mother

did hold that account with the shown amount of money. But then the time between the date of lodgment and the natural justice notice which is 07/03/2022, my family have significantly impacted by various reasons and unfortunately, they were forced to withdraw the money and closed the account. The circumstances are below:

1. Severe impact of COVID-19 on my family in India: As it has clearly known that COVID affect every country, but it has a very severe impact on India. My family was also the victim of this deadly virus. Both of my parents reported positive, and we have also lost my lovely aunt Taj Fatima on 02/04/2021 due to this virus. My mother's preexisting health condition which contains three kidney surgeries forced us to hospitalize her which incurred a significant cost on family's saving. My father also had heart surgery which required a significant amount of money. All the evidence will be attached for your reference which are COVID reports of my parent, hospital documents of my mother and the death certificate of Aunt Taj Fatima.

2. Extensive flooding in my hometown city Hyderabad in October 2020: Soon after the lodgment date of my visa, my home city suffered extensive flooding which mainly happened in my local estate named Hafiz Baba Nagar. It damaged our house very badly and cost a significant amount to repair the property. The photos of flooding will be attached and kindly check couple of news articles related to it:

   https://www.thehansindia.com/news/cities/hyderabad/hyderabad-\vehicles-suffer-extensive-damage-due-to-floods-652253https://www.thenewsminute.com/article/thankful-we-are-alive-hafiz-baba-nagar-residents-recount-horror-hyderabad-floods135934https://www.thehindu.com/news/cities/Hyderabad/hyderabad-left-gasping-afer-heavy-rains/article32885509.ece

3. Marriage of my sister on 10/11/2020: Due to the pressure of my sister's in law family, my parents were forced to arrange the marriage of her in urgency. The weddings in India are generally lavish and require significant amount of money especially by the girl's family. I am providing the wedding card for my sister's wedding as evidence of this statement.

I have clearly known that any provided source of funds to the department at the time of application needs to be maintained till the day of decision. But our unprecedented circumstances have forced us to use that money and the department has also taken more than the provided processing time of application. Here I also want to include my previous agent who lodged my student visa application because they have not advised properly about natural justice notice. Otherwise, I have already provided this above information to the case officerat that time. I really apologies that it took me to this situation due to not being responsive to the department during normal processing of my visa application, but it all happened due to the chosen agent at that time. Furthermore, I would like to say that despite all the financial hardship, my family have supported me in covering my study and living expenses. They have sent me monetary help a couple of times whenever I required it and currently have nearly INR 15,00,000 in term deposit at Karur Vysya bank for future help.

20. Documents containing receipts of transactions from my father to me, and the term deposit receipt will be provided as evidence. I hope the above information helps you to understand my family and mine situation which leads us to withdraw that money and found me not guilty for providing the bogus document.

21. **The hearing**

22. The applicant gave evidence at the hearing, the substance of which was as follows. The applicant had read the delegate's decision refusing his application for a student visa dated 29 July 2022. The applicant understood that the issue for determination was whether he provided a bogus document in support of his student visa application.

23. The Tribunal proceeded to ask the applicant some questions, the substance of which, and his responses, were as follows. He agreed that he made a student visa application on 7 October 2020. He also agreed that in support of which he lodged a bank statement and a bank deposit certificate in the name of his mother, Fatima Begum, dated 12 September 2020.

24. The Tribunal put to him that the Department concluded that the documents were bogus and invited him to comment but that he did not respond. In reply the applicant said “yes that is correct my agent did not guide me, he told me at last-minute and a lot of time and elapsed”.

25. The applicant agreed that the delegate concluded that the documents were bogus and on that basis refused to grant him a student visa.

26. The Tribunal observed that in the applicant’s recent undated letter he asserted that the documents were valid at the time of the application but not at the time of the Department’s letter, namely 7 March 2022. The applicant agreed.

27. The Tribunal asked whether the applicant had received copies of both documents which were sent to him by letter dated 17 July 2023. The applicant confirmed that he had received the documents. In answer to a further question he confirmed that the two documents were the documents in issue.

28. The Tribunal informed the applicant it had read his undated letter and the supporting documents and accepted that the various events which he discussed, such as his father’s illness, his mother’s illness and the events of Covid-19 and other matters, had in fact occurred.

29. He was asked when the money was withdrawn. He said “it was withdrawn at the onset of Covid-19, when Covid was at its peak. I was informed of the events”.

30. He was asked whether he had any documents confirming the withdrawal. He said “I did and then there were floods and everything got washed away”. The Tribunal observed that the bank would have records of the withdrawal. The applicant responded, “probably may but I haven’t contacted the bank since then”.

31. He was asked whether he had any documents confirming the initial deposit. He replied “during the floods all documents were washed away”. The Tribunal observed that the bank would have records of the deposit. He replied “yes they might have, but [I] haven’t contacted them”.

32. The applicant was asked whether his mother was alive and well. He said “she is okay at the moment, though, had kidney surgery, blood pressure and diabetic treatment and stroke in brain”.

33. The Tribunal observed that the applicant’s case seems to be that it did not matter whether the money was withdrawn because it was initially there at the time of lodgement in the student visa application. He was asked whether that was a fair summary. He said “yes that’s right, but when Covid-19 was at its peak at that time it was withdrawn”.

34. The applicant was invited to comment on the proposition that the genuineness of the documents are to be assessed when the student visa application is being assessed and not at the time they were lodged. He responded “my agent didn’t guide me”.

35. He was asked why it took him until very recently to provide this explanation. He said “because AAT just asked”. The Tribunal observed that the Department asked him to

comment on this issue on 7 March 2022 and he had been aware of it for a very long time. He said “because agent didn’t inform me about this, also under stress, although was told was documents refused, reason was not told”. The Tribunal informed the applicant that it found his answer difficult to accept and invited him to comment. He said “I am saying what was going on, because of this I had change agent”. When the question was repeated he said “that is what little I was told, I was going through a lot of stress, my ex-wife had filed a case, the family was unwell, and a lot of stress going on in my mind”.

36. The Tribunal asked the applicant when he became aware of the reasons for his student visa application being refused. He said “three or four days after the refusal”. The Tribunal asked him again later about taking until a few days ago to provide his explanation, when he had known of the reasons since three or four days after the decision record was published. He said “because when I went to agent to apply AAT, I was told had to provide certain documents, but not told exactly reason why visa was refused”. The Tribunal informed the applicant that it found his answer difficult to accept and invited him to comment. He said “they have told me have to provide the documents when Lodge AAT, not told to lodge documents, you will have to provide documents when AAT asked for them”.

37. The applicant was asked whether he had anything else to say in support of his application for review. He said “only the documents that I’ve submitted, only what I have written”.

38. The applicant’s representative was invited to provide any submissions. In substance he said that according to his client the documents were genuine, and he had explained what had happened.

39. He was asked to comment on the proposition that the genuineness of the document is to be assessed at the time of the student visa application being assessed not the time of lodgement of the document. His response was mainly concerned with the merits of his client’s application but he did say that his client was not advised properly by a previous agent. He did not directly respond to the proposition.

40. Finally the Tribunal notes that the applicant has provided no material or submissions to the effect that there are relevant compelling or compassionate circumstances which should be taken into account.

41. Conclusions

42. The Tribunal observes that the applicant made two points, in the hearing and in the undated letter. First, that the bank deposit certificate was true and correct as at the time of the student visa application, namely 7 October 2020. Secondly, that as at 7 March 2022, the bank deposit certificate was not true and correct because “my family have [been] significantly impacted by various reasons and unfortunately they were forced to withdraw the money and closed the account”. The Tribunal makes several observations in relation to these assertions.

43. As to the genuineness of the bank deposit certificate when provided, the Tribunal notes that the applicant does not state it was genuine from his own knowledge or with any vigour, rather he states that “according to my family in India, my mother did hold that account”. There were no documents produced to corroborate the bare assertion, and no testimony is provided by the account holder. The Tribunal also notes that the delegate stated that the bank had no record of such an account, not that such an account had previously existed but had been closed. It is reasonable to assume that a bank would have such records of present and previous accounts. The validity of the bank deposit certificate is central to the applicant’s case and the failure to produce any evidence to corroborate his bare assertion is given substantial weight by the Tribunal. The applicant has known since at least 7 March 2022 that this matter is an issue. Further, the Tribunal notes that despite being invited to comment on

the issue on several occasions the applicant did not do so until 31 July 2023, and then only by way of a bare, qualified assertion. The Tribunal does not accept the bank deposit certificate was valid at the date of the student visa application or at all.

44. As to the status of the bank deposit certificate on 7 March 2022, the Tribunal notes that the applicant has stated a variety of factors contributed to the decision to withdraw the money and close the account. He has provided documents to corroborate these factors. The Tribunal accepts that the events occurred as stated by the applicant and are corroborated by the various documents. However, the Tribunal does not accept that these factors caused the money to be withdrawn and the term deposit account to be closed. There are several reasons for this. The applicant has not produced any document to corroborate the withdrawal of funds and closure of the account and there was no testimony from the account holder. The applicant has known since at least 7 March 2022 that the validity of the bank deposit certificate is an issue and only very recently chose to reveal an explanation. Lastly the Tribunal observes that the applicant chose the date of the Department's letter, 7 March 2022, as the date by which the bank deposit certificate was no longer relevant. Whilst this is a convenient date the applicant has not stated when the funds were withdrawn, a date presumably well-known to those involved in the decision to withdraw the money if indeed it was ever there, and was ever withdrawn. These matters are given substantial weight by the Tribunal.

45. In any event a finding about the validity of the bank deposit certificate as at 7 March 2022 is unnecessary for two reasons. First, because the Tribunal has concluded that the bank deposit certificate was never a genuine document. Secondly, because the validity of the bank deposit certificate is not to be determined only by reference to the date it was provided but continues to be important during the process of the student visa application. It may well be, as is often the case, that the student visa application is not assessed until many months after the documents have been lodged. It is at the time of assessment of the student visa application that the documents need to be genuine and the information must not be false or misleading in a material particular. PIC 4020 requires that the document must be a genuine document at the time of decision. The applicant has admitted that after the bank deposit certificate was submitted, it became a false document and continues to be a false document. The Tribunal is satisfied that the applicant submitted a bogus document in support of his student visa application on or about 7 October 2020.

46. At various times during the hearing the applicant asserted that omissions were the fault of an unidentified agent. These included the applicant's failure to respond to the Department regarding the impugned document, and his failure to provide any documents or explanation regarding the impugned document until very recently. The Tribunal observes that these matters do not alter the fact of providing a document which he concedes is a bogus document. In any event the applicant is responsible for the acts and omissions of his agent. The Tribunal gives these assertions little weight.

47. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

48. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

49. The expressions ‘compelling circumstances’ and ‘compassionate or compelling circumstances’ are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of ‘compassionate’ relates to feelings of sympathy, sorrow, pity or concern for others.

50. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

51. The applicant has provided no material or submissions to the effect that there are relevant compelling or compassionate circumstances which should be taken into account. The Tribunal is not aware of any such circumstances. Accordingly there is no evidence before the Tribunal such that the requirements of PIC 4020 should be waived.

52. Therefore the requirements of PIC 4020 should not be waived.

53. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217.

DECISION

54. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Peter Booth
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
(a) the application for the visa; or
(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:
(a) starting 3 years before the application was made; and
(b) ending when the Minister makes a decision to grant or refuse to grant the visa;
the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:
(a) starting 10 years before the application was made; and
(b) ending when the Minister makes a decision to grant or refuse to grant the visa;
neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
(a) compelling circumstances that affect the interests of Australia; or
(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
justify the granting of the visa.

(5) In this clause:
information that is ***false or misleading in a material particular*** means information that is:
(a) false or misleading at the time it is given; and
(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

…

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or
(b) is counterfeit or has been altered by a person who does not have authority to do so; or
(c) was obtained because of a false or misleading statement, whether or not made knowingly.

…